No. 848

APR 5 1944

Supreme Court of the United States

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMANN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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TO THE HONORABLE THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA AND THE HONORABLE ASSOCIATE JUSTICES THEREOF:

Your petitioner, LYNBROOK GARDENS, INC., respectfully submits this petition for a writ of certiorari directed to the Supreme Court of the State of New York, Nassau County, to review the decision and order of the New York Court of Appeals in the above cause reversing the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, and dismissing the complaint, the Appellate Division in turn having affirmed a judgment and order of the Supreme Court of the State of New York, Nassau County, granting judgment on the pleadings for the petitioner (the plaintiff below) on one cause of action for specific performance of a contract for the sale of real property and for the respondent (the defendant below) upon a second cause of action of a similar nature.

The Court of Appeals decided this cause on December 8, 1943. Its decision was final. An order and judgment was entered in the office of the Clerk of Nassau County

on March 29, 1944, upon the remittitur of the Court of Appeals making the order and judgment of the Court of Appeals the order and judgment of the Supreme Court.

By order of Mr. Justice Jackson, dated March 3, 1944, petitioner's time to apply for a writ of certiorari was extended to and including April 6, 1944.

Opinions Below

An opinion was written by the Justice of the Supreme Court who heard the motion for judgment on the pleadings (R. 192). The Appellate Division unanimously affirmed the judgment of the Supreme Court, without opinion, other than a brief memorandum (R. 211). The Court of Appeals reversed, 6 to 1, the order of the Appellate Division, and dismissed the complaint. Chief Judge Lehman wrote an opinion in which four associate Judges concurred (R. 216). Judge Desmond wrote a dissenting opinion (R. 219). Judge Thatcher concurred in the result reached by the majority of the Court, but did not write a separate opinion. The majority and dissenting opinions are reported in 291 N. Y. at 472.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 344(b)).

Question Presented

The New York Court of Appeals declared that a substantial doubt exists with respect to the constitutionality of Article VII-A of Title 3 of the Tax Law of the State of New York, commonly called "the *in rem* tax lien foreclosure law" (N. Y. L. 1939, Ch. 692, effective October 1, 1939) under the Federal Constitution, and accordingly dis-

missed the complaint seeking specific performance of a contract for the sale of real property title to which depended upon the constitutionality of this statute.

The only question involved is:

1. Do the provisions of the *in rem* tax lien foreclosure law, which cut off the rights of on who receives no actual notice, constitute due process of law?

Statement

There are thousands of parcels of real estate in New York State upon which real estate taxes have been permitted to remain unpaid for a long period of years. In many instances the arrears of taxes exceed the present fair market value of the property. The reason that taxing districts have permitted this situation to arise is that the old method of foreclosing tax liens was too expensive. To remedy the evil, the New York legislature adopted Title 3 of Article VII-A of the New York Tax Law.

This cause arose as follows:

The petitioner agreed to sell and the respondent agreed to buy two parcels of property, the title to which came through a proceeding instituted by the Village of Lynbrook for foreclosure of tax liens by action *in rem* under Article VII-A.

Substantially, the parties agreed that the respondent need not take title as to one parcel unless the title was of such a character that it would be good even though it should at some time transpire that an infant, incompetent, absentee or non-resident had had an interest in the property and had received no actual notice of the *in rem* proceeding, and, as to the second parcel, unless the title would be good even though it should transpire not only that such an interested party had received no actual notice, but also that the taxes on which the *in rem* foreclosure

proceedings were based had actually been paid instead of being unpaid. The petitioner tendered deeds of the property and the respondent rejected them on the ground that while the statute purported to vest such a title in the petitioner, it was ineffective to do so because of its unconstitutionality under the due process provisions of the State and Federal Constitutions.

Petitioner brought an action setting forth the agreements and the tender and refusal, and demanded specific performance. The respondent filed an answer admitting all of the allegations of the complaint, and moved for judgment on the pleadings on the ground that the provisions of the *in rem* foreclosure act (Article VII-A of the Tax Law) were unconstitutional.

A Special Term of the Supreme Court held the statute constitutional in so far as it purported to cut off the interests of the persons who had received no actual notice of the *in rem* proceedings, but held that the statute should not be construed as purporting to have that effect in a case where the taxes upon which the municipality attempted to base the *in rem* proceedings had been paid (Opinion of Hon. Peter M. Daly, J., R. 192). The result was that judgment for specific performance was given for the petitioner on the first cause of action and that judgment was given for the respondent dismissing the complaint on the second cause of action (R. 5). The Appellate Division unanimously affirmed this result (R. 206, 208). It appears, however, from the memorandum of the Appellate Division's decision that the Court may have been of the opinion that the statute did purport to cut off the interests of persons who had received no actual notice even though the taxes had been paid but considered the statute unconstitutional in so far as it purported to have this effect. (Memorandum of Appellate Division's decision, R. 211, wherein it is stated that "Carswell, J.

concurs as to first cause of action and likewise concurs as to invalidity of statute referred to in second cause of action, but as to latter deems that there is no aggrieved owner or suitor before the court entitled to have a ruling as to the constitutionality of that statute.") The Court of Appeals reversed the decision of the Appellate Division and dismissed the complaint. The majority of the Court said that a substantial question was presented as to the constitutionality of the statute under the Federal Constitution, and since the Court of Appeals could not finally determine this question, it would not order specific performance.

Specifications of Error

The Court below erred:

1. In holding that there was a substantial question as to the constitutionality of Article VII-A under the Federal Constitution.

2. In holding, in substance and effect, that Article VII-A of the Tax Law of the State of New York was unconstitutional under the Federal Constitution.

Reasons Relied on for the Allowance of the Writ

1. ***The Decision of the New York Court of Appeals was Based Entirely Upon a Federal Question, i.e., the Supposed Doubt as to the Constitutionality of the Statute Under the Federal Constitution.***

The Court of Appeals accepted the principle that a party who has contracted to purchase real estate cannot avoid his obligation when the doubt as to the title can be removed by the decision of the Court in the specific performance action (R. 218). It refused to order specific performance solely because its decision would not finally

determine the constitutionality of the statute under the Federal Constitution.

In the opinion concurred in by the majority of the Court Judge Lehman said (our R. 218):

> "In this case, however, the courts of this State cannot authoritatively determine the questions of law which create serious doubt as to the validity of the statute by virtue of which the seller has acquired title and no decree of specific performance can give to the buyer assurance that the title transferred to him will not be successfully challenged thereafter."

The only question of law which the Court of Appeals thought it could not finally determine was the constitutionality of the statute under the Federal Constitution. This appears from the majority opinion (R. 218):

> "This court can authoritatively determine whether or not the statute violates the provisions of the Constitution of the State of New York; only the Supreme Court of the United States can ultimately determine whether the statute violates the provisions of the Constitution of the United States. Even though this court were to sustain the validity of the statute, the Supreme Court of the United States might still reach a different conclusion."

The decision of the Court of Appeals that there is a substantial doubt as to the constitutionality of the statute will, of course, be final so far as your petitioner is concerned unless this Court grants certiorari.

Moreover, the pronouncement of the highest court of the State of New York that the constitutionality of the statute presents a substantial question will be sufficient to deter tax districts from using it. If the statute is not used, its constitutionality can never be determined. The effort of the New York Legislature to correct a serious evil will have been nullified without a real consideration of the validity of its enactment.

The fact that the Court of Appeals did not in words say that the statute was unconstitutional does not prevent a review by this Court.

In Robertson and Kirkham's "Jurisdiction of the Supreme Court of the United States", 1936, it is stated at chapter 11, section 61, page 109:

> "Actual decision of the federal question in terms by the state court is not required; it is sufficient that the federal question was fairly presented by the record, was necessary to a determination of the cause, and that no adequate nonfederal ground of decision appears."

The foregoing summary of the rule is amply justified by the decisions of this court.

> *Lawrence* v. *State Tax Commission*, 286 U. S. 276;
> *Ward* v. *Love County*, 253 U. S. 17;
> *Minnesota* v. *National Tea Co.*, 309 U. S. 551.

In the *National Tea Co.* case, *supra*, Mr. Justice Douglas said, at page 557:

> "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."

2. *The Constitutionality of the Statute.*

Notwithstanding the majority opinion of the Court of Appeals, we respectfully submit that there is no substantial doubt about the constitutionality of the statute under the decisions of this Court.

> *Winona & St. Peter Land Company* v. *Minnesota*, 159 U. S. 526;
> *Leigh* v. *Green*, 193 U. S. 79.

An examination of the statute will show that the proceeding which it prescribes constitutes due process under the foregoing authorities.

(a) The Statute

The statute permits a tax district voluntarily to adopt the provisions of Title 3 of Article VII-A (Tax Law, Sec. 162). Once Title 3 has been adopted "Whenever it shall appear that a tax district owns a tax lien which has been due and unpaid for a period of at least four years from the date on which the tax assessment or other legal charges represented thereby became a lien, such tax lien shall be summarily foreclosed by the tax district in the manner provided in this title, * * *" (Tax Law, Sec. 165).

First a list must be filed in the County Clerk's office setting forth brief descriptions of the parcels where the liens are to be foreclosed, the names of the last known owners as they appeared on the assessment roll and the amount of each tax lien upon each parcel. Copies are filed in the office of the collector and attorney for the taxing district. The filing of this list constitutes under the terms of the statute the commencement of an action to foreclose the tax liens therein described (Tax Law, Sec. 165-a, subd. [1]). The list filed by the Village of Lynbrook for the year 1940, through which the titles here involved are derived, appears on pages 22 to 51 of the record.

Every person having any right, title or interest in or lien upon any parcel described in such list may redeem it or may serve an answer setting forth any defense or objections. In the event of his failure to do so, he shall be barred and forever foreclosed of all his right, title and interest in and to the parcels described in the list and a judgment in foreclosure may be taken (Tax Law, Sec. 165-a, subd. [2]).

To give persons interested notice of the foreclosure proceedings a notice must be published at least once a week for six successive weeks in two newspapers in the tax district. This notice tells of the filing of the list and contains an express warning that such filing constitutes the commencement of an action to foreclose the tax lien and that persons having an interest may redeem or answer within a period therein named. The notice states that in the event of the failure to redeem or answer the person interested shall be forever barred and foreclosed of all his right, title, interest and equity of redemption and that a judgment in foreclosure may be taken. This notice must also be posted in three conspicuous places and mailed to the last known address of each owner of property affected thereby as the same appears upon the records in the office of the collecting officer. The copies of the notices mailed must bear a further notice to the addressee advising him that he is the presumptive owner or lienor of one or more of the parcels mentioned and that unless the taxes are paid or an answer interposed the ownership of the property will in due course pass to the taxing district (Tax Law, Sec. 165-b).

If no answer is interposed, the court must make a final judgment awarding the tax district the possession of the parcel concerned with a direction to the collecting officer to execute a deed to the tax district conveying to it full and complete title (Tax Law, Sec. 165-h, subd. [6]). The statute continues as follows:

> "Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such land and all persons, including the state of New York, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption."

The statute also provides that where as to any parcel an answer has been interposed by another tax district, the tax districts may by agreement between themselves provide for a conveyance without sale of such parcel to one of such tax districts free and clear of any right, title or interest, and in such event the title thus vested is of the same character as though no answer had been filed (Tax Law, Sec. 165-h, subds. [3] and [5]).

No claim has been made at any stage in this litigation that the tax district did not comply with the procedure provided in the statute. The record shows that it did.

(b) The *In Rem* Proceeding as due process of law

Except in admiralty cases, American courts have always held that some kind of notice to those interested in the property is necessary even in an *in rem* proceeding in order that the constitutional requirements of due process of law might be fulfilled. The commonest form of giving such notice is publication of the procedure in a newspaper, often combined with posting in public places and mailing to the last known address of the defendant.

In 1878 Minnesota adopted an *in rem* tax lien foreclosure statute which provided for filing a list of delinquent taxes, publication of the list and a decree of court foreclosing the rights of all interested parties who did not appear. This statute was sustained in *Winona & St. Peter Land Company* v. *Minnesota*, 159 U. S. 526. It differed from the New York statute now under consideration in only two substantial respects: (1) the Minnesota statute required publication of the whole list, while our statute requires only a publication of the notice that the list has been filed; (2) the Minnesota statute required a foreclosure sale, while ours permits a taxing district in event of default to take over the property.

In *Leigh* v. *Green*, 193 U. S. 79, this Court upheld a statute so similar to the one at bar that the case is almost

completely controlling. In that case a Nebraska statute provided for the publication of a description of the property on which taxes were delinquent and a decree of the court foreclosing the rights of all interested parties who did not appear. A publication describing the property named the wrong owner so that the rightful owner had no notice of the foreclosure but the title of the purchaser in the foreclosure sale was upheld against the rightful owner who had thus been deprived of notice.

The Nebraska statute differed from the New York statute in but two respects: (1) it provided for the publication of the description of the property instead of merely a notice that the description had been filed as in the case at bar, and (2) it provided for a sale of the property instead of a conveyance to the taxing district. Neither of these differences is determinative.

Neither the publication of the description nor even of the notice is required by due process of law as there has been the equivalent of public posting by filing the list in the County Clerk's office. The publication is required out of solicitude for the landowner rather than to meet the necessities of the law.

Nor does the fact that the property is simply conveyed to the taxing district instead of being put through the form of a sale render the statute unconstitutional. The notice which is posted and published apprises the landowner that if he does not answer he will be foreclosed of all interest in the property. If the state can by posting and publication obtain jurisdiction over a man for the purpose of selling his property under a statute which provides sale as a method of foreclosure, it can certainly obtain jurisdiction over him in the same way for the purposes of taking title to his property under a statute which provides for taking title as a method of foreclosure. Indeed, the *strict* foreclosure which the *in rem* tax lien en-

forcement statute adopts (as opposed to foreclosure by sale) was, in England, the only way of enforcing a mortgage (*Bolles* v. *Duff*, 43 N. Y. 469, 474). Though recognized as a severe remedy, strict foreclosure is so deeply embedded in our law that it must be "due process". The important thing, however, is that jurisdiction is obtained over the land and that notice given to the landowner is sufficient. Once there is jurisdiction and valid notice, the course of proceedings thereafter is immaterial so long as carried on as prescribed by law.

3. *A Question of Public Importance is Involved.*

The purpose of the *in rem* tax foreclosure statute is to permit taxing districts to get areas blighted by tax arrears back into the tax-paying class at a minimum of expense. A notorious example of such an area in New York State is what is known as the soap-box lot section of the Town of Bedford, Westchester County. The Larkin Soap Company of Buffalo owned a tract of wild land there, and in the eighties divided it up on paper in 100-foot lots, and gave away a deed to a lot with every box of soap sold. Taxes were never paid by the soap buyers, and there is no possibility that any of the hundreds of scattered owners would be willing to pay the accrued taxes to get the property and yet their theoretical right to do so prevents the Town of Bedford, which is the real owner of the land, from giving a clear title to it without hundreds of expensive tax foreclosure proceedings. While the soap-box lot section is an extreme example, there are numerous areas throughout the State where parcels of real estate are so far under water because of tax arrears that they are not available for any useful purpose. The public importance of the question presented in this litigation is indicated by the fact that in the New York courts the following tax districts appeared as *amici curiae*, seeking to uphold the statute:

Counties of: Chautauqua, Chemung, Erie, Orange and Steuben.

Town of: New Castle.

Cities of: Amsterdam, Auburn, Batavia, Buffalo, Dunkirk, Elmira, Glens Falls, Jamestown, Lackawanna, Newburgh, New Rochelle, Rochester, Schenectady, Utica and Yonkers.

Villages: of: Blasdell, Cedarhurst, East Rockaway, Floral Park, Freeport, Garden City, Hempstead, Johnson City, Lynbrook, Malone, Mamaroneck and Valley Stream.

Anne M. Leach, a property owner in the Village of Lynbrook also appeared as *amicus curiae* and attacked the constitutionality of the statute throughout the litigation in the New York courts.

We respectfully urge that the Court of Appeals erred in not holding that the statute was constitutional under the Federal Constitution;that this court should grant certiorari and should reverse the judgment of the Court of Appeals dismissing the complaint and remand the case to the Court of Appeals so that it may pass on the constitutionality of the statute under the State Constitution.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RAPHAEL W. ALPHER,
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(6)

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE.

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STATEMENT

This petition for certiorari seeks review of a final judgment of the New York Court of Appeals in *Lynbrook Gardens, Inc.* v. *Ullmann*, 291 N. Y. 472 (1943), dismissing the complaint in an action for specific performance of a contract for the sale of land. The issue tendered in the cause was the constitutionality of Art. 7-A, tit. 3, of the Tax Law of the State of New York (Laws of New York 1939, ch. 692).

FACTS OF THE CASE

The petitioner acquired title to the property involved by a conveyance from the Village of Lynbrook, which in turn had acquired it in proceedings brought for the foreclosure of tax liens under the provisions of Tax Law, Art. 7-A, tit. 3, entitled "FORECLOSURE OF THE TAX LIEN BY ACTION IN REM." Thereafter, petitioner and respondent entered into a contract for the sale and purchase of the property. At the time set for closing, respondent refused to accept title and resisted petitioner's suit for specific performance on the ground that the tax law which authorized the proceeding *in rem* for the foreclosure of the tax liens contravened the "due process" clauses of the Federal and State Constitutions in that it provided for judgment of foreclosure without personal service of process.

The Court of Appeals held that the complaint should be dismissed because petitioner could not deliver a marketable title. The *ratio decidendi* was stated by the Court as follows (291 N. Y., at p. 477).

> "The question of the validity of the statute has been challenged on substantial grounds. This court can authoritatively determined whether or not the statute violates the provisions of the Constitution of the State of New York; only the Supreme Court of the United States can ultimately determine whether the statute violates the provisions of the Constitution of the United States. Even though this court were to sustain the validity of the statute, the Supreme Court of the United States might still reach a different conclusion. A subsequent purchaser could at any time reject title on that ground and litigate that question in a different forum. A title which can be challenged in that manner is not marketable and decree of specific performance may not be rendered under such circumstances."

IMPORTANCE OF THE CONSTITUTIONAL ISSUE PRESENTED

The question of the constitutionality of the statute is of vital importance to states, municipalities and other taxing authorities all over the country. To carry on the manifold functions of local government, most municipalities rely almost entirely upon the revenues derived from taxes on real estate. The expeditious collection of taxes permits municipalities to realize the amount of levy, and makes it unnecessary to borrow money to carry on the business of government. Conversely, tax delinquency impedes the orderly conduct of municipal affairs on a planned basis and causes increased borrowing, thus adding substantially to municipal indebtedness and expense.

Increase in tax delinquency can be directly traced to statutes which are not strong enough to effect prompt tax collection. Statutes under which many years must elapse before the process of collection against delinquent property can be set in motion, and, in addition, afford the owners of such property several years for redemption from a tax sale, have been found to encourage tax delinquency. The statute in question was designed to cut down the period of delinquency and to place in the hands of municipalities a summary remedy for the collection of taxes and the enforcement of their liens. The statute was further designed to make tax collection simpler and less expensive than at present, and to make certain that titles obtained under the foreclosure procedure would be good and marketable.

In most jurisdictions the tax sale is merely an intermediate step, and the holder of a tax sale certificate cannot obtain title until after a considerable period of time for redemption has elapsed. Moreover, the many complicated jurisdictional steps in the divestiture process result in

questionable titles. Furthermore, a process of foreclosure by plenary suit is expensive and cumbersome.

Tax Law, Art. 7-A, tit. 3, and similar statutes enacted elsewhere, are intended to overcome these evils—first, by providing a summary process of foreclosure in the courts, and second, by providing a more simplified and economical procedure.

The great public importance of the constitutional issue here involved is readily perceived from the fact that in New York State alone, although the statute was enacted as recently as 1939, more than 30 municipalities and other taxing districts have already elected to adopt the provisions of the statute (Tax Law, N. Y., § 162). Many other cities, towns and villages have evinced a desire to make such an election when it becomes certain that the statute is constitutional and that titles obtained thereunder will be marketable.

This brief in support of the petition herein is filed because the unusual and unprecedented action of the New York Court of Appeals involves in doubt the validity—as to the Federal constitution—of state tax foreclosure statutes now in use by member cities of the National Institute of Municipal Law Officers not only in New York but in all states where *in rem* tax foreclosure procedure has been adopted.

The public interest in effective, simple and inexpensive tax collection procedures which comply with all constitutional requirements also makes this case one of great public importance. The New York statute involved in the instant case provides a method whereby tax liens can be foreclosed through such procedures for less than $1.00 per parcel of land. The Corporation Counsel of the City of Jamestown, New York, reported in 1941 that under this law foreclosure "proceedings in the City of Jamestown included 3,811 parcels at a cost of $0.89 for each parcel." Municipalities and The Law in Action (1941), 283. When

this experience under the New York *in rem* statute is compared with the experience in New Jersey where tax liens are foreclosed in a proceedings which is *in personam* in character it is found "The cost of clearing the title under the present procedure varies from $200.00 to $400.00 for each property." *Perfection of Title to Tax Forfeited Lands,* NEW JERSEY MUNICIPALITIES (magazine), May, 1941, page 7.

The economy of the method of foreclosure of tax liens by action *in rem* is further illustrated in comparison with methods of foreclosure by plenary suit similar to that in mortgage foreclosure cases by the following table based on practice and experience in a typical city in the State of New York:

Table of Costs

	Plenary Foreclosure Suit *	*Summary in Rem Suit*
Title Search	$12.50	$00.00
Notice to Redeem	5.00	.25
Tax Search	1.00	1.00
Continuation Title Search	3.50	00.00
Continuation Tax Search	1.00	00.00
Service of Summons and Complaint	5.00	.25
Advertising Fee	28.00	.10
Legal Fees	45.00	3.00
	$101.00	$4.60

* These costs are taken from the official records of a city operating under a statute which eliminates referees' fees and which cuts costs to the very minimum. They are taken from a typical action in which no answer was submitted and judgment taken by default. There was personal service of process and no additional expense of service by publication. XANTHAKY, *"Tax Foreclosure Problems,"* Thirtieth Annual Meeting of the Conference of Mayors of the State of New York.

If this Court upholds the constitutionality of New York's *in rem* statute such action will not only put at rest any doubts which exist in states now having the *in rem* procedure but will also indicate to other states that they may now safely effect a great savings of public tax money by adopting a similar procedure.

ARGUMENT

When the owner of real estate upon which taxes are due has been given due notice of the assessment of the taxes, with an opportunity to be heard, the Legislature, in the exercise of taxing power, may provide for foreclosure of the real property by a municipality through summary action in rem without personal service of process. This does not constitute the deprivation of property without due process of law.

1. A tax collection statute affords due process of law though it does not provide for personal service of notice.

Article 7-A, tit. 3, of the Tax Law contains a complete plan for the collection of taxes by foreclosure of tax liens through a summary action *in rem*. Whenever taxes are due and unpaid for a period of four years, the tax liens may be summarily foreclosed without the necessity for a prior tax sale (§ 165). The tax collecting officer is required to file annually in stated public offices, a list of all property affected by such unpaid tax liens, including a description of the premises, the name of the last known owner and the amount of each tax lien. The Court is given jurisdiction over the *in rem* action authorized by the title. Any person having an interest may redeem before the expiration of a date published in a notice, or may serve an answer setting forth any defense or objection to the foreclosure. In the event of failure to redeem or answer, such person shall be in default, and forever foreclosed of all his right, title and interest in the property, and judgment in foreclosure may be taken (§ 165-a). Upon the filing of the annual lists, the tax collecting officer is required to cause a notice of foreclosure in prescribed form, (1) to be published at least once a week for six successive weeks in two newspapers published in the tax district, (2) to be posted in several conspicuous places, and (3) mailed to the last known owner

(§ 165-b). Mortgagees and other lienors who have filed requests for notice with the tax collecting officer shall also receive mailed notice (§ 165-c). The trial of the issues raised by answer is provided for (§ 165-e), as well as final judgment of foreclosure which may provide for a sale of the property or a deed to the tax district by the tax collecting officer (§ 165-h).

This Court has upheld the constitutional validity of statutes, strikingly similar to the one in question. *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526 (1895); *Leigh* v. *Green,* 193 U. S. 79 (1904). Moreover, the New York Court of Appeals, shortly before the decision in the instant case, had sustained the constitutionality of this very statute and directed specific performance. *City of Utica* v. *Proite,* 178 Misc. 925 (Sup. Ct., Sp. T., Oneida Co., 1941), aff'd 288 N. Y. 477 (1942). See also, *Pottock* v. *Mellott,* 2 Terry (41 Del.) 361, 22 A. (2d) 843 (1941).

The "due process" clause of the Fourteenth Amendment requires that a tax *assessment* statute make provision for notice and an opportunity to be heard. No such requirement exists for a tax *collection* statute. Such a statute, this Court has held, need not provide for any notice to the delinquent taxpayer of any of the steps in the collection process. *McMillen* v. *Anderson,* 95 U. S. 37 (1877); *Hagar* v. *Reclamation District,* 111 U. S. 701 (1884); *Spencer* v. *Merchant,* 125 U. S. 345, 355-356 (1888); *Palmer* v. *McMahon,* 133 U. S. 660, 669-670 (1890); *Winona & St. Peter Land Co.* v. *Minnesota, supra;* 3 Cooley, *Taxation* (4th Ed), §§ 1112, 1113, 1120, 1313.

In *Hagar* v. *Reclamation District, supra,* this Court said (111 U. S., at p. 710):

> "The officers [assessors] in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in

prescribing the time when such complaints will be heard, *gives all the notice required*, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property is due process of law." (Italics ours.)

The statute here involved (Tax Law, Art. 7-A, tit. 3) is concerned only with the *collection* of real estate taxes. The Tax Law makes full provision for notice and hearing before assessment of the taxes (§§ 25, 26, 27, 290). Since the statute guarantees notice and the right to be heard in connection with the *assessment* of the taxes, the constitutional requirements of due process would be satisfied even if the *collection* statute provided for no notice whatever to the delinquent taxpayer. Thus, this statute more than satisfies the requirements of due process of law, for it provides for the giving of notice by publication, posting and mailing (Tax Law, Art. 7-A, tit. 3, § 165-b).

2. In effectuating the process of tax collection by sale of tax delinquent property, the Legislature may employ such procedure as it deems reasonable.

In the statute in question, the Legislature has given all persons claiming to have an interest in the property the right to redeem or to obtain an adjudication, through the Courts, of possible defenses within a limited time after publication of process. Correlatively, the statute enables the taxing authority to obtain a clear title to the property by means of a simple and inexpensive procedure.

Under this statute, it is the land which is accountable for the taxes. The owners must be presumed to have knowledge of the laws relating to the assessment and collection of the taxes. The Legislature is justified, therefore, in providing for ultimate divestiture even without notice to the delinquent owner. *Ontario Land Company* v. *Yordy*, 212 U. S. 152 (1909); *Ballard* v. *Hunter*, 204 U. S. 241, 254-255 (1907).

Many different forms of tax collection have been the subject of legislative enactment. Though often of a drastic and stringent nature, their constitutional validity has been uniformly upheld. Thus, there has been distress of chattels (see, as to New York, Laws of 1788, ch. 65; Laws of 1801, ch. 178; Laws of 1816, ch. 115; 1 Rev. Stats. 397, § 2; Laws of 1835, ch. 122; Laws of 1843, ch. 230; Laws of 1882, ch. 410, § 853; Tax Law, § 71); seizure and sale of the property of third persons in the possession of the delinquent taxpayer (*Sheldon* v. *Van Buskirk,* 2 N. Y. 473 [1849]; *Hersee* v. *Porter,* 100 N. Y. 403, 409-411 [1885]); garnishing a debtor of the delinquent taxpayer (Acts of 1893 (N. Car.), ch. 296, § 1 (now N. Car. Code, 1931, § 8004); Ky. Stats., § 4184 (now Ky. Rev. Stats., ch. 135, § 135.010), held valid and constitutional in *City of Wilmington* v. *Sprunt,* 114 N. C. 310, 19 S. E. 348 (1894); arrest and imprisonment after demand for payment of delinquent taxes (Mass. Gen. L., ch. 60, § 29, p. 722, derived from Mass. Stats. (1785), p. 568, ch. 70, § 2); fine and imprisonment for non-payment (Laws of New York, 1842, ch. 318) imposed in *Matter of Nichols,* 54 N. Y. 62 (1873); outright forfeiture of lands to the State after publication of a list of delinquent taxpayers (Act of 1790 (Va.), ch. 5, § 5; W. Va. Code, 1868; W. Va. Act of March 4, 1869), upheld in *State* v. *Sponaugle,* 45 W. Va. 415, 32 S. E. 283 (1898).

Statutes providing for the outright forfeiture of real property have been sustained by this Court though they did not provide for personal service of notice. *King* v. *Mullins,* 171 U. S. 404 (1898); *King* v. *West Virginia,* 216 U. S. 92 (1910); *Fay* v. *Crozer,* 217 U. S. 455 (1910); *Kentucky Union Company* v. *Kentucky,* 219 U. S. 140 (1911). A statute (Laws of New York 1941, ch. 268) providing for the appointment of receivers of the rents, issues and profits of tax delinquent properties without any notice to the owner has been held constitutional by the New York Court of Appeals. *Matter of City of New York (801-815 E. New York Ave.),* 290 N. Y. 236 (1943).

Ordinarily, a court is without power to grant judgment unless it has acquired jurisdiction over either the person or the subject matter. Jurisdiction over the person is usually obtained by personal service. Jurisdiction over the subject matter may be acquired by publication of process. It should be observed, however, that where courts are vested with jurisdiction in cases of tax collection, they do not act judicially in the strict sense of the word. Their functions really are part of an administrative process. Judicial assistance in those cases is invoked as a matter of convenience,—adequately to protect the rights of taxpayers and to conserve the public interest. This Court has recognized that the necessity for expeditious collection of taxes is such that the sovereign is not required by the Constitution to curb or render ineffective the machinery of tax collection by subjecting it to the delay attendant upon service of process and to lengthy and expensive judicial controversy. The exercise of this power through summary methods of procedure in the Courts with constructive notice to the taxpayer of the institution of proceedings does not constitute a deprivation of property without due process. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1855); *McMillen* v. *Anderson, supra; Springer* v. *United States*, 102 U. S. 586 (1880); *Palmer* v. *McMahon, supra; Phillips* v. *Commissioner*, 283 U. S. 589 (1931); *Spencer* v. *Merchant, supra.* However, even if it were to be assumed that jurisdiction in tax collection cases is strictly part of the judicial process and not mostly administrative, it is submitted that, as we have shown (*ante* page 9), the requirements of due process are still fulfilled by the provisions of the statute under consideration by publication of due notice of foreclosure in newspapers, the posting of the same in conspicuous places, and the mailing thereof to the last known owner.

Necessity for review by this Court also exists by reason of the conflict in the decisions of the State Courts. In the

case of *In re Auditor General*, 275 Mich. 462, 266 N. W. 464 (1936), *e. g.*, the Court held that a statute providing for publication of a petition and order showing only that a judicial proceeding for the sale of tax delinquent lands was pending, without any description of the lands affected or identification of the owners, effected a deprivation of property without due process of law, in violation of the Federal and State Constitutions. If the view expressed in the foregoing case be followed, the principles so well established by this Court will be nullified.

CONCLUSION

Title to thousands of parcels of property has already passed into the hands of many municipalities and other taxing authorities through the operation of this statute. Hundreds of properties have already been sold by the municipalities to purchasers for value. In turn, many of these have sold the properties to others. The decision of the Court of Appeals herein has the effect of casting serious doubt on the validity of these titles. The fiscal affairs and efficient management of local governments, and the security of the many who have made substantial investments in such properties for homes, businesses and farms, stress the need for determination by this Court of the constitutional question presented.

Respectfully submitted on behalf of the 389 member cities of the National Institute of Municipal Law Officers:

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(7)

MAY 2 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1943

No. 848

LYNBROOK GARDENS, INCORPORATED,

Petitioner,

against

BERNARD C. ULLMANN,

Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Statement

The petition for a writ of certiorari herein seeks review of a final judgment of the New York Court of Appeals in *Lynbrook Gardens, Incorporated* v. *Ullmann,* 291 N. Y. 472 (1943), which judgment reversed the lower courts and dismissed the complaint in an action for specific performance of contracts for the sale of land. The respondent contended that Article VII-A of Title 3 of the Tax Law of the State of New York (Laws of New York 1939 Ch. 692) under which title to said land was derived was unconstitutional.

ARGUMENT

The Supreme Court of the United States is without jurisdiction to grant a writ of certiorari herein.

The Court of Appeals of the State of New York did not actually decide any Federal question and the deciding of a Federal question was not a pre-requisite to the judgment as rendered.

The Court of Appeals in its majority opinion stated (R. 218):

> "In this case, however, the Courts of this State cannot authoritatively determine the questions of law which create serious doubt as to the validity of the Statute by virtue of which the seller has acquired title and no decree of specific performance can give to the buyer assurance that the title transferred to him will not be successfully challenged thereafter. The question of the validity of the Statute has been challenged on substantial grounds. This Court can authoritatively determine whether or not the Statute violates the provisions of the Constitution of the State of New York; only the Supreme Court of the United States can ultimately determine whether the Statute violates the Provisions of the Constitution of the United States. Even though this Court were to sustain the validity of the Statute, the Supreme Court of the United States might still reach a different conclusion. * * *
>
> A title which can be challenged in that manner is not marketable and a decree of specific performance may not be returned under such circumstances."

From the foregoing it is evident that the Court of Appeals not only did not decide the constitutionality of the Statute under the Constitution of the United States, but as a pre-requisite to the rendering of its decision did not deem it necessary to decide its constitutionality under the Constitution of the State of New York.

Further evidence of the fact that the Court of Appeals did not decide the question of the constitutionality of this Statute under the Constitution of the United States is found in its dissenting opinion in which it states (R. 222):

> "It would not do under these circumstances for a single Judge of this Court to state his views as to that question of constitutionality, so I content myself with dissenting on the ground that this Court should determine the question in this case."

The only defense affirmatively presented by the respondent in the Court of Appeals was the contention that Article VII-A of Title 3 of the Tax Law of the State of New York, under which title to the lands in question had been derived, was repugnant to the Provisions of Section 1 and 6 of Article I of the Constitution of the State of New York and Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that said Statute attempts to deprive persons of their property without due process of law. The Court of Appeals did not decide the constitutionality of this Statute, but rather based its judgment upon the theory that a question of its constitutionality might exist under the Constitution of the United States and that, while such question existed, the title derived under such Statute was not marketable and consequently a decree of specific performance could not be rendered.

To secure a review by the United States Supreme Court of a decision of a state court on certiorari the necessary pre-requisite is exemplification of a Federal question, that was affirmatively presented, that its decision was necessary to the determination of the cause and that it was actually decided or that judgment as rendered could not have been found without deciding it. (*Honeyman* v. *Hanan,* 300 U. S. 14, 21; *Southwestern Bell Telephone Co.* v. *State of Oklahoma,* 303 U. S. 206, 212 and 213; *Scott* v. *Platt,* 137 P. (2) 975; *Williams* v. *Keyes,* 186 S. 250; Judicial Code Section 237, 28 U. S. C. A. 344.)

The Supreme Court of the United States may examine the opinion of State Courts to ascertain whether a Federal question was raised and decided (*State of Indiana, ex rel Anderson* v. *Brand,* 303 U. S. 95).

The respondent contends that the Court of Appeals of the State of New York not only did not decide the constitutionality of the Statute, but by its decision herein has found that a decision upon the constitutionality of Article VII-A of Title 3 of the Tax Law of the State of New York was not necessary to a determination of the cause (R. 216-222). Such decision does not constitute sufficient basis to confer upon the Supreme Court of the United States jurisdiction to grant a writ of certiorari (*State of Minnesota* v. *National Tea Co.,* 309 U. S. 551, 555).

CONCLUSION

Certiorari should be denied.

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APR 19 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943.

No. 848.

LYNBROOK GARDENS, INCORPORATED,
Petitioner,

vs.

BERNARD C. ULLMANN.

PETITION AMICUS CURIAE OF THE STATE TAX COMMISSION OF THE STATE OF NEW YORK IN SUPPORT OF WRIT OF CERTIORARI.

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HERMAN COHEN,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

IN THE

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October Term, 1943.

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LYNBROOK GARDENS, INCORPORATED,
Petitioner,

vs.

BERNARD C. ULLMANN.

PETITION IN SUPPORT OF WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, as the State Tax Commission of the State of New York, respectfully urges favorable consideration of the petition for writ of certiorari in the above entitled case now pending before this Honorable Court.

The constitutionality of Title 3 of Article VII-A of the Tax Law of the State of New York is here involved.

History of Article VII-A of the Tax Law.

The collection of unpaid real property taxes in New York has long been a matter of public concern. In general, the procedure for the collection of such taxes is, in effect, to

sell a tax lien at public auction, and if there is no bid, such lien is acquired by the tax district conducting the sale. A conveyance of the property may be obtained by the tax sale purchaser or by the tax district, but titles so conveyed have not been generally accepted because of numerous technicalities in the assessment and levy of the tax and in the procedure for redemption. In 1930, provision was made for the foreclosure of tax liens by action, as in action for the foreclosure of mortgages (section 163 of the Tax Law, as added by Chapter 809, Laws of 1930). However, foreclosing tax liens by that method was expensive, costing at least $100 a parcel, and hence was infrequently invoked.

In 1938, as a result of various studies, it was clear that a less complicated and expensive procedure for the foreclosure of tax liens in New York had become a matter of public necessity. There was a tremendous amount of unpaid real property taxes due the various localities of the state. In a study made by the State Planning Division of the Executive Department (Problems Created by Premature Subdivision of Urban Lands in Selected Metropolitan Districts), it appeared that, considering only five cities of the state and forty-seven of the sixty towns in three counties, of 292,901 vacant lots and lands on the tax rolls, 162,771 were in arrears for taxes and assessments. Many of these taxes had been in arrears since 1917, and the greater part had been in arrears as early as 1931. Indeed, in many cases the accumulated arrears of taxes were well in excess of assessed valuations.

Because of public distrust of tax titles, a tax district was unable to sell tax liens to private tax sale purchasers and was required to bid them in on its own behalf. For the same reason, a tax district could not dispose of property

so acquired. The result was a heavier tax burden on other property owners in the district and the creation of "blighted areas", title to which was uncertain and which were not productive of revenue for the tax district. Local tax structures were thereby seriously affected.

Confronted with this situation, the State Tax Commission, the New York State Conference of Mayors and Other Municipal Officials and the Committee on Municipal Law of the New York State Bar Association, collaborated in the preparation of a bill to provide a simpler, more effective and less expensive method of foreclosing tax liens. The bill became Chapter 692 of the Laws of 1939 and added Article VII-A to the Tax Law. Titles 1 and 4 of said Article contained general provisions. Title 2 provided for the foreclosure of tax liens as in the foreclosure of mortgages, both by tax districts and by private tax sale purchasers. Title 3 provided for the foreclosure by action *in rem* of tax liens over four years old, but only by a tax district.

Under the *in rem* method it was estimated that the cost of foreclosure would be less than $5 per parcel, in place of the $100 per parcel under the former procedure.

Public Importance of the Question.

Since the enactment of said Article VII-A the State Tax Commission of the State of New York has urged the numerous tax districts of the state to adopt its provisions and has prepared and furnished the necessary forms to the tax districts. The beneficial effects that were anticipated have been realized through practical experience. The average cost of foreclosure has been under the anticipated $5 a parcel, and many properties have been restored to

the tax rolls as a result of the adoption of said Article by the various cities, villages, towns and counties set forth in the petition herein. Furthermore, many tax districts are awaiting an authoritative decision as to the constitutionality of Article VII-A before adopting its provisions. In addition, since the enactment of said Article in New York, Connecticut and Maryland have enacted similar provisions. (Annotated Code of Maryland (1939 Ed.) Article 81, secs. 90-q to 90-u, inclusive, as enacted by Chapter 761 of the Laws of 1943; Conn. P. A. 1943, Chapter 419).

The decision of the Court of Appeals does not decide the constitutional validity of Article VII-A. Consequently, title to thousands of parcels of real estate in New York which have been foreclosed by tax districts is left unsettled.

It is of primary importance to the real property tax system of the State of New York that this question be authoritatively determined.

WHEREFORE, the State Tax Commission of the State of New York respectfully prays that the petition herein be granted.

Albany, N. Y., April 15, 1944.

MORTIMER M. KASSELL,
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HERMAN COHEN,
With him on this petition.

No. 848

MAY 1 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMAN,

Respondent.

PETITION FOR PERMISSION TO SUBMIT A BRIEF AS AMICUS CURIAE

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Supreme Court of the United States

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMAN,

Respondent.

PETITION FOR PERMISSION TO SUBMIT A BRIEF AS AMICUS CURIAE

To The Honorable The Chief Justice Of The Supreme Court of The United States Of America And The Honorable Associate Justices Thereof:

Your petitioner, ANNE M. LEACH, is a property owner in the County of Nassau, which property is subject to, or might become subject to the provisions of Article 7-A of the New York State Tax Law. As such owner, she has an interest in the outcome of the litigation herein, which has as its avowed object the testing of the constitutionality of that Statute.

Your petitioner has been permitted to file a brief as amicus curiae in the Supreme Court, Appellate Division and the Court of Appeals in the New York State Courts, and prays for permission from this Court to file the accompanying brief as amicus curiae on this application for a writ of certiorari to the Court of Appeals of the State of New York.

Your petitioner has been informed orally that the parties to the action have or will consent to the submission of such a brief.

MILTON PINKUS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMAN,

Respondent.

BRIEF FOR ANNE M. LEACH, A PROPERTY OWNER IN THE VILLAGE OF LYNBROOK AS AMICUS CURIAE

The law involved here provides a new method of creating a so-called tax title to real property. So far as is known there is no method of selling lands for taxes in the State of New York which has ever been held unconstitutional. Taxes have been held unconstitutional, but never methods of collecting them by a sale of the land. The constitutionality of this particular method had been expressly upheld by the New York Court of Appeals before the present action was commenced (*City of Utica* v. *Proite*, 288 N. Y. 468).

The real difficulty which the Plaintiff and the Defendant sought to overcome by the present action is the question of the marketability of the resultant title, and not of the method employed in creating it. The marketability of the title depends, in turn, upon the facts of the cause, e. g., how substantially the procedure commanded by the statute was followed.

The statute does not require that the Plaintiff take possession of the property as in the case of personal prop-

erty. Though the proceeding is one "in rem", as are all foreclosures or forfeitures of land, the possession acquired is purely constructive and statutory and may often be contradicted by the actual fact. Consequently, the important consideration is the existence in each case of the facts on which jurisdiction depends. One of these facts would be the existence of an unpaid tax. Without that, no matter what forms were gone through, no jurisdiction could be obtained and the formal title would be invalid.

All title insurance companies and all lawyers examining titles consider the foregoing statement of law as evident —indeed, obvious.

The proponents of the law, however, entertain a directly opposite opinion. They believe that the form and not the substance should and does control. To put their position in concrete terms, they believe that by means of the procedure authorized by this law, the municipality can vest itself with a valid title to a man's house in which he is residing even though he has paid the taxes lawfully levied thereon and holds the receipts for such payments.

To obtain a ruling on this point, the Plaintiff and Defendant entered into the contracts and commenced this action.

The object of this brief is to persuade the Court that the petition for a writ of certiorari should be denied.

Why the Petition Should Be Denied

I. There is no controversy between the parties.

Both the Plaintiff and Defendant believe strongly in the validity of titles made under this statute, no matter what the facts. Both the parties, as well as all but one

of the amici curiae, were interested in supporting rather than testing the resultant title. Under such conditions, an authoritative decision is almost impossible. The facts as to the payment of the tax by the former owner are suppositions. As Mr. Justice Carswell pointed out in the Appellate Division, the former owner is not a party to the action and what the actual parties seek is an unauthorized advisory opinion. Under those circumstances, a solemn decree of specific performance, or denying it, is unseemly.

II. There is no constitutional question involved. The dismissal of the complaint rests on a non-federal ground.

In the first place, the constitutionality of the statute has been established (*City of Utica* v. *Proite,* 288 N. Y. 468).

Secondly, specific performance will not be decreed where there is real danger of a lawsuit as to the title (*Fleming* v. *Burnham,* 100 N. Y. 10). The reality of that danger in this case may be conceded to be doubtful, since the facts of payment of the tax are admittedly suppositious. Nevertheless, the Court of Appeals evidently considered that a decree would be improper where the Court's judgment would not bind the former owner. It is noticeable that it dismissed the complaint and did not decree any return of the deposit. The parties had entered into an unenforcible contract and could have no relief against each other.

III. There is no question of public importance involved.

The petitioner seems guilty of some exaggeration here. There is nothing in the record to substantiate any of its claims. But it will be noticed that the Plaintiff has appended to its complaint a copy of its foreclosure list containing *all* of its unpaid taxes from the incorporation of the Village to a period four years before the filing. Many of these were doubtless paid or redeemed before judgment, but if we assume none of them to have been, their grand total forms a very, very small percentage of the annual budget of the Village of Lynbrook which is more than $300,000.00 a year.

The petitioner does not mention the fact that under alternative methods of enforcement, thousands upon thousands of properties are annually foreclosed for taxes and sold to builders, who obtain title insurance and mortgages thereon, and that in most such cases the municipality has recovered all its taxes and all of its expenses. It could have added that some of these properties were located in the Village of Lynbrook.

The Petition should be denied.

Respectfully submitted,

MILTON PINKUS,
Attorney for Anne M. Leach, Amicus Curiae.

EUGENE R. HURLEY,
Of counsel.

(10)

MAY 6 1944

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 848

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMANN,

Respondent.

PETITION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

L. ARNOLD FRYE,

Counsel for the

Counties of Chautauqua, Chemung, Erie, Orange and Steuben,

Town of New Castle,

Cities of Amsterdam, Auburn, Batavia, Buffalo, Dunkirk, Elmira, Glens Falls, Jamestown, Lackawanna, Newburgh, New Rochelle, Poughkeepsie, Rochester, Schenectady, Utica and Yonkers,

Villages of Blasdell, Cedarhurst, Floral Park, Freeport, Garden City, Hempstead, Johnston City, Lynbrook, Mamaroneck and Valley Stream,

as *Amici Curiae.*

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TO THE HONORABLE THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND ASSOCIATE JUSTICES THEREOF;

Your petitioners, the Counties of Chautauqua, Chemung, Erie, Orange and Steuben, the Town of New Castle, the Cities of Amsterdam, Auburn, Batavia, Buffalo, Dunkirk, Elmira, Glens Falls, Jamestown, Lackawanna, Newburgh, New Rochelle, Poughkeepsie, Rochester, Schenectady, Utica and Yonkers, and the Villages of Blasdell, Cedarhurst, Floral Park, Freeport, Garden City, Hempstead, Johnson City, Lynbrook, Mamaroneck and Valley Stream, are all taxing districts of the State of New York which either have adopted Article VII A of the New York Tax Law or will adopt the same if it is held valid, and are therefore interested in the issue before the Court in the above entitled cause. Your petitioners respectfully request leave to file the annexed brief as *amici curiae* in

support of the petition for a writ of certiorari. Consent of the parties to the filing of such brief is submitted herewith.

Statement

The history of this litigation and the questions involved therein have, we believe, been sufficiently stated in the petition and briefs heretofore filed, and will not be repeated here.

Reasons Relied on for the Allowance of the Writ

1. *The statute was intended to give needed relief to New York municipalities. Its constitutionality should not be allowed to go undecided.*

The purpose of Article VII A was to provide a simple and inexpensive method of reclaiming real property which has been abandoned to tax arrears. Such properties are frequently grouped together to form large areas. Usually the individual tax lots in such arrears are of small value and because the owners have taken no interest in them for many years, titles are often involved, with the result that the cost of foreclosure (by the methods available before the enactment of Article VII A) is high. Foreclosure under Article VII A makes such blighted areas again available for some useful purpose at a cost commensurate with the low value of the land. It seems to us, therefore, that Article VII A has a proper social and economic purpose.

The only issue raised below was whether or not the statute was constitutional. The lower courts in New York might have refused to enforce the contracts set forth in the complaint if they believed that a substantial question as to the constitutionality of the statute was presented.

This, however, would not have prevented the plaintiff from taking the case to the Court of Appeals.

Ferry v. *Sampson*, 112 N. Y. 415.

The Court of Appeals recognized the principle that a contract for the sale of real property will be enforced where the decree itself constitutes an authoritative determination of the doubtful question (Opinion by Lehman, Ch. J., R. 212). Nevertheless, the court refused, in terms, to pass on the constitutionality of the statute on the ground that its decision would not be authoritative. It expressly stated, however, that the grounds upon which the constitutionality of the statute had been challenged, were substantial (R. 218). In effect, therefore, the court did pass on the constitutionality of the statute and, for all practical purposes has made it unavailable for the purposes and uses for which it was intended.

The Court of Appeals could not have reached the result it did without passing on a federal question, to wit, whether or not there is a substantial doubt as to the constitutionality of Article VII A under the Federal Constitution. This Court can authoritatively pass on the constitutionality of the statute. We respectfully submit that the question should be decided.

Foster v. *Scott*, 136 N. Y. 577;
Pomeroy on Specific Performance, 3rd Ed. 1926, par. 202 et. seq.

2. *The matter is one of great public importance.*

The facts with respect to the public importance of the cause have been set forth in the petition and briefs heretofore filed herein.

The importance of the cause is further indicated by the appearance of the member cities of the National Institute of Municipal Law Officers, and the State Tax Commission of the State of New York, as *amici curiae*.

Conclusion

WHEREFORE, we respectfully pray that the petition herein be granted.

L. ARNOLD FRYE,

Counsel for the

Counties of Chautauqua, Chemung, Erie, Orange and Steuben,

Town of New Castle,

Cities of Amsterdam, Auburn, Batavia, Buffalo, Dunkirk, Elmira, Glens Falls, Jamestown, Lackawanna, Newburgh, New Rochelle, Poughkeepsie, Rochester, Schenectady, Utica and Yonkers,

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